Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems	)	ET Docket No. 98-153

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Cingular Wireless LLC ("Cingular"), on behalf of its subsidiaries and affiliates, hereby replies to the sole Opposition[1] to its Petition for Reconsideration[2] of the *Memorandum Opinion and Order* ("*MO&O*") in the above-captioned proceeding[3] filed by XtremeSpectrum, Inc. ("XSI"). As discussed more fully below, reconsideration of the *MO&O* is proper because the Commission failed to adequately address the record and legal arguments previously raised by Cingular. Reconsideration should be granted because the Commission lacks statutory authority to permit unlicensed UWB operation and because the record lacks evidence supporting the Commission's interference conclusions. Moreover, reconsideration is appropriate because the legal authority cited by the Commission does not support its conclusion that CMRS licensees are not entitled to exclusive use of their licensed spectrum.

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1 Opposition of XtremeSpectrum, Inc. to Cingular's Petition for Reconsideration, ET Docket No. 98-153 (Sept. 4, 2003) ("Opposition").

2 Cingular Petition for Reconsideration, ET Docket No. 98-153 (May 22, 2003) ("Petition").

3 *Revision of Part 15 of the Commission's Rules Regarding UWB,* ET Docket No. 98-153, *Memorandum Opinion and Order and Further NPRM*, 18 F.C.C.R. 3857 (2003).

I. CINGULAR'S PETITION FOR RECONSIDERATION WAS PROPER

XSI asserts that Cingular's Petition should be dismissed because the arguments either were raised in a prior petition for reconsideration or have been raised too late.[4] These claims are without merit.

Cingular demonstrated the inadequacy of the record in its Initial Petition.[5] The Commission summarily dismissed this claim without any analysis of the record. Thus, Cingular is entitled to re-raise the issue on reconsideration.[6] In fact, if Cingular went directly to court on this issue, there likely would be a remand to deal with the issue.[7] Cingular's current Petition challenges the basis for the Commission's unsubstantiated and conclusory statement that "there have been considerable analyses throughout this proceeding on every possible aspect of interference. . . ."[8] As demonstrated in the Petition,[9] this statement is inconsistent with the record.[10] Ironically, XSI's Opposition contains the same defects as the *MO&O* – it states that the Commission adequately addressed the testing issue, but fails to offer any record support for this contention.[11] Accordingly, reconsideration is appropriate.

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4 Opposition at 1-4. *See* Cingular Petition for Reconsideration, ET Docket No. 98-153 (June 17, 2002) ("Initial Petition").

5 Initial Petition at 10-14, 20-21.

6 *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (noting that there must be a rational connection between the record and the choice made); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

7 *See State Farm*, 463 U.S. at 43; *Burlington*, 371 U.S. at 168.

8 *MO&O*, 18 F.C.C.R. at 3897.

9 Petition at 15-22.

10 XSI also takes issue with Cingular's reference to the recommendations of the Commission's Technological Advisory Council ("TAC"). Opposition at 3, 5. These recommendations, however, demonstrate the arbitrary and capricious nature of the *MO&O*. Specifically, they support the Commission's implicit recognition that there must be comprehensive test data and analysis prior to authorizing UWB, yet the *MO&O* fails to rely on any such data.

11 *See* Opposition at 4-5.

XSI also claims that Cingular should be barred from "springing" jurisdictional issues on the Commission at this time.[12] This claim is without merit. Both XSI and the Commission have acknowledged that Cingular attempted to raise this issue *prior* to the adoption of the *MO&O*.[13] Rather than resolve the issue in the *MO&O*, the Commission incorrectly concluded that it need not address the issue because it was raised more than 30 days after the deadline for petitions for reconsideration.[14] It is well-established, however, that jurisdictional arguments may be raised at any point in a proceeding. The D.C. Circuit has indicated that it will entertain jurisdictional claims that were never raised before an agency if the asserted jurisdiction violates a clear right conferred in a specific statute, or where an agency attempts to exercise a power that has been specifically withheld.[15] As discussed in the Petition, Section 301 of the Act clearly requires a license for the transmission of radio energy and Section 307(e) specifically limits the categories of unlicensed operations. Thus, by permitting UWB operations on an unlicensed basis, the Commission attempts to exercise jurisdiction that Congress specifically withheld and Cingular may raise this issue at any time.

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12 *See* Opposition at 7.

13 *See* Opposition at 7; *MO&O*, 18 F.C.C.R. at 3915.

14 *MO&O,* 18 F.C.C.R. at 3915.

15 *See Chamber of Commerce v. Reich,* 74 F.3d 1322, 1327-1328 (D.C. Cir. 1996); *Dart v. U.S.,* 848 F.2d 217, 222 (D.C. Cir. 1988); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987); *see also Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996) (stating that "it is well-established judicial doctrine that any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits, that a potential jurisdictional defect may be raised by the court or tribunal, *sua sponte* or by any party, at any stage in the proceedings, and, once apparent, must be adjudicated."). The Supreme Court also has noted that "[e]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause of action under review'" – even if the parties do not raise the issue at all. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

II. THE AUTHORIZATION OF UWB DEVICES ON AN UNLICENSED BASIS VIOLATED SECTION 301 OF THE ACT

In response to Cingular's claim that the Commission lacks authority to permit UWB transmissions without a license, XSI claims that Section 302(a) of the Act authorizes unlicensed transmissions.[16] XSI also asserts that the Commission has previously cited Section 302 as the statutory basis for unlicensed operations and that the Commission's interpretation of the Act is entitled to deference.[17] Both claims are without merit.[18]

With respect to the Commission's ability to permit unlicensed operations, the statute is unambiguous[19] and the Commission is entitled to *no deference*.[20] Section 301 of the Act prohibits wireless transmissions without a license. The only exception to this requirement is expressly set forth in Section 307(e).

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16 Opposition at 10-11.

17 Opposition at 11-14.

18 XSI also claims that the Commission already ruled on the jurisdictional question when it rejected a petition for reconsideration filed by the ARRL in Docket No. 98-156. Opposition at 8-9 (citing *Certification of Equipment in the 24.05-24.25 GHz Band*, ET Docket No. 98-156, *Memorandum Opinion and Order*, FCC 03-175, ¶11 (rel. July 21, 2003) ("*ARRL Order*")). This characterization grossly misinterprets the decision, however. In fact, the Commission expressly stated that it did "not reach ARRL's statutory argument." *ARRL Order* at ¶11. Thus, Cingular's jurisdictional argument was never addressed. In essence, XSI takes the position that because the Commission authorized unlicensed operations, the Commission must have jurisdiction. Such an approach is nonsensical. Jurisdiction is bestowed by statute, not by the Commission.

19 *See* Petition at 10-12.

20 In determining whether the Commission is entitled to deference with respect to statutory interpretation, any analysis must start with the principles enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There, the Court held that, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. An agency's interpretation of its enabling statute is entitled to deference only where there is statutory ambiguity and the interpretation is "reasonable." *Id.* at 845. None of the case law cited by XSI contradicts this fundamental tenet of administrative law. *See* Opposition at 11-13. Where there is no ambiguity, there are no gaps to fill. *Cf.* Opposition at 13-14. XSI incorrectly alleges that that the Commission is entitled to extraordinary deference in its statutory interpretation due to its technical expertise. *Id.* at 11-13. The cases cited by XSI merely stand for the proposition that Courts will afford agencies deference with respect to policy judgments and predictions that involve technical matters. *Id.* & notes 34-35, 37. The deference provided in these cases does not extend to questions of statutory interpretation.

Contrary to XSI's claims,[21] Section 302(a) does not provide the Commission with an independent statutory exception to the Section 301 licensing requirement. Section 302(a) was adopted in 1968 to authorize the Commission to impose transmitter standards on equipment manufacturers.[22] Absent enactment of 302(a), the Commission could not prohibit the manufacture of equipment capable of causing interference.[23] The Commission's sole recourse was to track down these devices once they caused interference.[24] By enacting Section 302(a), the Commission was given the authority to order manufacturers to take steps to minimize interference from devices before the sale of the devices to the general public.[25]

Congress made clear, however, that it was not altering the requirements of Section 301.[26] Whereas Section 301 is aimed at the *operation* of equipment, Section 302(a) is a proactive regulatory mechanism requiring mitigation of interference before equipment reaches the marketplace – the antithesis to XSI's contention. The intent of Congress was to eliminate the after-the-fact approach to controlling interference.[27] Nothing in the statute or legislative history states that the licensing requirement of Section 301 was being altered. Accordingly, Section 302(a) does not contravene Section 301 and grant the Commission authority to authorize unlicensed UWB operations.

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21 Opposition at 10-11, 17.

22 *See, e.g.*, S. Rep. No. 1276 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2486.

23 *See* 1968 U.S.C.C.A.N. 2486-88.

24 *See id.*

25 *See* Communications Act Amendments of 1982, P.L. 97-259, H.R. Conf. Rep. No. 97-765 at 31-32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2266.

26 *See* 1968 U.S.C.C.A.N. at 2487.

27 *Id.* at 2488. Ironically, the Commission's authorization of UWB now requires licensed operators to utilize an after-the-fact approach to interference resolution.

XSI attempts to buttress its argument by claiming that the Commission must have the authority to permit unlicensed UWB operations pursuant to Section 302(a) because Congress was aware of unlicensed operations and tacitly accepted these operations.[28] Section 302(a), however, cannot be the jurisdictional basis for the Commission's rules authorizing unlicensed operations[29] because the rules originated in 1938, approximately 30 years before adoption of Section 302(a).[30]

Moreover, the adoption of the Commission's rules for unlicensed devices was premised on a narrow reading of the license requirement contained in Section 301.[31] According to the Commission, the Section 301 licensing requirement did not apply to *intrastate* transmissions.[32] Congress plugged this hole – and thus eliminated the purported statutory basis for Part 15 – in 1982 when it amended Section 301 "to make clear that the Commission's jurisdiction over radio

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[28] Opposition at 14-16. The Commission should beware of attributing any significance to XSI's claims: "the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions" which do not exist here. *See Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947). As noted in *Chisholm v. FCC:*

> [A]ttributing legal significance to Congressional inaction is a dangerous business. *See, e.g., Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408-10 (1961). The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price*, 361 U.S. 304, 310-11 (1960).

538 F.2d 349, 361 (D.C. Cir. 1976).

[29] Opposition at 10-11.

[30] *See Revision of Part 15 of the Rules Regarding the Operation of RF Devices without an Individual License*, GEN. Docket No. 87-389, *First Report and Order*, 4 F.C.C.R. 3493 (1989) (noting that the Commission's unlicensed rules originated in 1938); *see, e.g.*, 1968 U.S.C.C.A.N. 2486 (adopting Section 302(a)).

[31] *See Amendment of Part 15 of the Commission's Rules Governing Restricted Radiation Devices*, Docket No. 9288, *First Report and Order*, 13 RR (P&F) 1543, 1544 (1955).

[32] *Id.*

communications extends to intrastate as well as interstate transmissions."[33] Congress stated that the amendment would also make Section 301 consistent with prior judicial decisions finding that all radio signals are inherently interstate.[34]

XSI claims that, although Congress expanded the scope of Section 301 in 1982, it *preserved* the Commission's authority to permit unlicensed operations by adopting Section 302(a) in the same legislation.[35] This is incorrect. Section 302(a) was adopted in 1968 to give the Commission authority to adopt transmitter standards.[36] Congress did not adopt Section 302(a) in 1968 to somehow "preserve" the legal authority for unlicensed operations that would be eliminated by legislation enacted fourteen years later. Although Congress did amend Section 302(a) in 1982, this legislation merely extended the Commission's authority to cover receiver standards.[37] Neither the 1968 nor the 1982 legislation indicated that Section 302(a) created an exception from the Section 301 licensing requirement.

Moreover, the 1982 legislation did adopt Section 307(e) to "de-licens[e]" certain services.[38] If XSI's statutory interpretation were correct, there would have been no need to amend Section 307 to permit the operation of certain facilities without a site specific license – the Commission already would have had such authority pursuant to Section 302(a).

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33 1982 U.S.C.C.A.N. 2261, 2275-76.

34 *Id.* at 2276 (citing *Fisher's Blend Station,* 297 U.S. 650, 655 (1936)).

35 Opposition at 17.

36 1968 U.S.C.C.A.N. 2486.

37 1982 U.S.C.C.A.N. 2237, 2266-67.

38 *Id.* at 2280.

It is a fundamental tenet of statutory construction that Courts will adhere to the literal meaning of unambiguous statutes.[39] Sections 301, 302(a), and 307(e) are unambiguous and consonant.[40] Section 301 requires a license for the transmission of energy and radio signals; Section 302(a) authorizes the Commission to adopt transmitter and receiver standards; and Section 307(e) exempts a limited number of services from the licensing requirement. XSI attempts to graft ambiguity onto these provisions when no such ambiguity exists. Statutes are not to be read in such a creative manner when they are clear on their face.[41] The Commission must give effect to the unambiguously expressed intent of Congress. Moreover, XSI's interpretation of Section 302(a) would render Section 307(e) unnecessary because there would be no need for statutory exceptions to a licensing requirement if the Commission already had unbridled authority to permit unlicensed operations. XSI's interpretation would thus contravene yet another principle of statutory construction that precludes interpretations that render other statutory provisions superfluous.[42] Accordingly, XSI's interpretation of Section 302 is incorrect.

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[39] *See Board of Governors of the Federal Reserve System v. Dimension Financial Corp. et al.*, 474 U.S. 361, 368 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[40] Where the statute is clear, Courts will not resort to legislative history – especially subsequent legislative history -- to determine Congressional intent. *Ratzlaf v. United States,* 510 U.S. 135, 147-48 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear."). Accordingly, XSI's citation to vague references in legislative history to buttress its interpretation of Section 302(a) is unavailing. *See* Opposition at 14-16.

[41] *Ratzlaf,* 510 U.S. at 147-148; *Missouri Municipal League v. FCC*, 299 F.3d 949, 953 (8th Cir. 2002) ("[W]e should not strain to create ambiguity in a statute where none exists.").

[42] *See Department of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); *Mountain States Tel. & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) ("It is a time-honored tenet that [a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous.").

Cingular agrees with XSI that this jurisdictional issue may have far reaching implications.[43] Thus, the Commission should determine immediately the extent of its jurisdictional authority – at the infancy of UWB. The Commission either has jurisdiction to permit unlicensed UWB devices or it does not. If the FCC postpones resolution of the issue, as espoused by XSI, unnecessary harm would be caused to UWB manufacturers; they would be investing additional money manufacturing equipment designed to operate in an unlawful manner.[44] Rather than encouraging the waste of these financial resources by continuing to act unlawfully by permitting the roll-out of UWB services and equipment,[45] the Commission should act now to resolve the fundamental jurisdictional issue.

III. THE PREMISE FOR DENYING CMRS LICENSEES' EXCLUSIVITY IS FUNDAMENTALLY FLAWED

In its Petition, Cingular demonstrated that the Commission undermined the rights to exclusive spectrum use granted CMRS licensees by misinterpreting *AT&T Wireless Services, Inc. v. FCC,* 270 F.3d 959 (D.C. Cir. 2001) ("*AWS*"). XSI now claims that the FCC correctly concluded that *AWS* upheld its authority to permit unlicensed operations on the same spectrum authorized exclusively for CMRS use.[46] Setting aside the fact that the case involved a remand,[47] the "secondary" airborne operations at issue in the case were permitted based on the fact that

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43 Opposition at 7.

44 XSI talks about the adverse financial consequences for companies specializing in unlicensed devices if such operations are precluded by statute. The Commission also must consider that the statutory prohibition on such operations was design to protect *licensees* from the adverse consequences associated with the proliferation of unlicensed devices and the chaos that would follow. *See* Petition at 10.

45 *Id.*

46 Opposition at 22-23. This argument responds to a new fact – the Commission's reliance on *AWS* – raised for the first time in the *MO&O.* Accordingly, the instant Petition was the first opportunity to address the issue. *See* 47 C.F.R. § 1.106(c)(1).

47 *Compare* Petition at 23 *with* Opposition at 22-23.

they were *conducted pursuant to licenses* held by CMRS licensees.[48] UWB operations are not conducted pursuant to licenses. Accordingly, *AWS* cannot support the Commission's authorization of UWB on an unlicensed basis.

CONCLUSION

As discussed above and in Cingular's Petition, the Commission should reject XSI's Opposition and reconsider its decision to permit the unlicensed operation of UWB devices.

Respectfully submitted,

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[48] *See AWS,* 270 F.3d at 964. The court actually classified these operations as the resale of licensed services. *Id.*

CERTIFICATE OF SERVICE

I, Joy Taylor, do hereby certify that on this 17h day of September 2003, a copy of the foregoing Reply to Opposition to Petition for Reconsideration was served by U.S. Mail, first-class postage prepaid to the following:

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